

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

THOMAS McCARTNEY,)	
)	
Claimant,)	IC 2007-011715
v.)	
)	
APOLLO COLLEGE,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Employer,)	AND RECOMMENDATION
)	
and)	
)	FILED MAY 28 2008
WAUSAU BUSINESS INSURANCE COMPANY,)	
)	
Surety,)	
Defendants.)	
_____)	

INTRODUCTION

The Idaho Industrial Commission assigned this matter to Referee Douglas A. Donohue. He conducted a hearing in Boise on January 30, 2008. J. Brent Gunnell represented Claimant. Monte R. Whittier represented Defendants. The parties presented testimony and documentary evidence. They submitted briefs. The case came under advisement on April 8, 2008, and is now ready for decision.

ISSUES

After due notice and by subsequent agreement of the parties, the issues are as follows:

1. Whether Claimant is entitled to temporary disability benefits (TTDs); and
2. Whether Defendants should pay attorney fees for their denial of TTDs.

CONTENTIONS OF THE PARTIES

RECOMMENDATION - 1

Claimant contends he was fired under pretext by Employer. Defendants wanted to avoid paying TTDs while Claimant was on a light-duty work release. Defendants' actions were unreasonable.

Defendants contend Claimant is not entitled to TTDs. He was fired for violating Employer's policies. Light-duty work was available. Claimant, by violating Employer's policy, effectively refused suitable available work. Defendants' actions were not unreasonable.

EVIDENCE CONSIDERED

The record in the instant case consists of the following:

1. Oral testimony at hearing by Claimant, supervisor Charles Ericson, and former co-workers Tonya Ann Pinkston and Emily Mead;
2. Claimant's exhibits 6-11; and
3. Defendants' exhibits A, F, H-M.

After considering the record and briefs of the parties, the Referee submits the following findings of fact, conclusions of law, and recommendation for review by the Commission.

FINDINGS OF FACT

1. The parties stipulated Claimant was on a light-duty work release when fired. Those work restrictions have never been lifted.

2. Claimant was injured at work on February 21, 2007. He received a light-duty work release. As his regular duties accommodated the light-duty release, he continued to work.

3. On June 5, 2007, Employer conducted an exit interview with Ms. Mead who was leaving to take a position with another employer. Ms. Mead expressed her discomfort with the sexual content of conversations initiated by her former co-worker, Claimant. His comments were a factor in her decision to quit working for Employer.

RECOMMENDATION - 2

4. Employer investigated. On June 11, 2007, Employer fired Claimant for violation of Employer's written policy prohibiting sexual harassment.

5. At hearing, both female former co-workers who testified somewhat downplayed their discomfort or outrage at Claimant's frequently inappropriate comments. They both acknowledged that Claimant made inappropriate sexual comments to them.

Discussion and Further Findings

6. **Temporary disability.** If Employer made a reasonable, actual offer of suitable employment which was refused by Claimant, Employer is not liable for TTD benefits beyond the date of refusal. Malueg v. Pierson Enterprises, 111 Idaho 789, 727 P.2d 1217 (1986). Here, if Employer fired Claimant because of the injury, no actual offer of suitable employment was made. On the other hand, if Claimant was fired for cause unrelated to the injury, then he has refused suitable employment.

7. The facts of this case are more like those in Smith v. Champion Building Products Division, 1994 IIC 1511, 94 IWCD 9896, than those in Madeleine 2003, 2003 IIC 0301. Claimant violated a written policy unrelated to workers' compensation. So did Mr. Smith. By contrast, "Madeleine" challenged the appropriateness of the job tasks assigned to her following her injury. Thus, "Madeleine's" firing was related to her workers' compensation claim.

8. Employer need not risk liability for civil claims from other workers just because the offending co-worker has a pending workers' compensation claim. While lesser discipline short of termination might equally have remedied the problem, it is not for the Commission to micromanage an Employer's disciplinary decisions. Employer's written policy fairly warned Claimant against inappropriate comments and about the potential disciplinary results, including termination.

RECOMMENDATION - 3

9. Employer acted reasonably. It did not seek an excuse to fire Claimant. Rather, a serious reason for discipline was raised when a former co-worker not only complained but also quit as a result, in part, of Claimant's inappropriate actions. Employer conducted a reasonable investigation. The record shows it is likely that Employer did not fire Claimant for any reason other than Employer's stated one.

10. **Attorney fees.** Attorney fees shall be awarded where the Commission finds the conditions of Idaho Code § 72-804 are satisfied. Bradley v. Washington Group International, 141 Idaho 655, 115 P.3d 746 (2005). Here, Defendants acted reasonably at all times.

CONCLUSIONS OF LAW

1. Claimant failed to show it likely that his termination would entitle him to benefits under the Malueg standard; and

2. Claimant failed to show he is entitled to attorney fees under Idaho Code § 72-804.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 22ND day of May, 2008.

INDUSTRIAL COMMISSION

ATTEST:

/S/_____
Douglas A. Donohue, Referee

/S/_____
Assistant Commission Secretary

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APOLLO COLLEGE,)	ORDER
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)	FILED MAY 28 2008
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)	

Pursuant to Idaho Code § 72-717, Referee Douglas A. Donohue submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant failed to show it likely that his termination would entitle him to benefits under the Malueg standard.

2. Claimant failed to show he is entitled to attorney fees under Idaho Code § 72-804.
3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 28TH day of MAY, 2008.

INDUSTRIAL COMMISSION

/S/ _____

James F. Kile, Chairman

R. D. Maynard, Commissioner

/S/ _____

Thomas E. Limbaugh, Commissioner

ATTEST:

/S/ _____

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 28TH of MAY, 2008 a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

J. Brent Gunnell
1226 East Karcher Road
Nampa, ID 83687-3075

Monte R. Whittier
P.O. Box 6358
Boise, ID 83707

db

/S/ _____

ORDER - 2